

(158) 2023:PHHC:134078
IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO No.2 of 2023 (O&M)
Date of decision: 12.10.2023

SH.BHAGWAN (DECEASED) THROUGH LRS AND OTHERS

....PETITIONERS

Vs.

STATE OF HARYANA AND OTHERS

....RESPONDENT

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present : Ms. Nevadita Malik Sharma, Advocate for the appellants.
Mr. J.S.Pannu, AAG, Haryana.

ANIL KSHETARPAL, J. (Oral)

1. On 09.08.2023, the following order was passed:-

“ CM-729-CII-2023

For the reasons stated in the application for condonation of delay, which is supported by an affidavit, the application is allowed.

The delay of 157 days in filing the appeal is condoned.

CM stands disposed of.

Main case

The learned counsel representing the appellants inter alia contends that the First Appellate Court has erred in remanding the suit back to the trial Court only after framing an additional issue.

Notice of motion.

Ms. Vibha Tewari, Assistant Advocate General, Haryana, accepts notice on behalf of respondent No.1 and 2.

The remaining respondents were co-plaintiffs with the appellants.

Hence, their interest is common with the appellants.

Consequently, their service is dispensed with.

List on 18.08.2023, in the urgent list. ”

2. On a perusal of the judgment passed by the First Appellate Court on 02.04.2022, it is evident that the judgment and decree passed by the trial Court has been set aside only on the ground that the trial Court failed to frame proper issues in accordance with Order 14 Rule 1 of the Code of Civil Procedure. The First Appellate Court has neither discussed the reasons given by the trial Court nor analyzed the same before setting aside the judgment and decree passed by the trial Court.

3. The First Appellate Court has enabling power to remand the case back to the trial Court only in two eventualities. Firstly, the Appellate Court can remand the case back to the trial Court, if the suit is decided upon a preliminary point which is reversed in appeal. In this case, the suit was not decreed on a preliminary point. Secondly, it is permissible for the First Appellate Court to remand the case back to the trial Court, if the decree is reversed in appeal and a re-trial is considered necessary. Thus, the power of remand is available to the Appellate Court only in the eventuality provided under Order 41 Rule 23-A of the Code of Civil Procedure. In fact, this aspect has been examined in detail in 'Smt. Bhagwan Devi (since deceased) through her LRs Vs. Smt. Veena Devi @ Krishna Devi and another', SAO No.82 of 2015, decided on 18.07.2023. Para 04 of the judgment reads as under:-

“ 4. The power of the Appellate Court to remand the case back to the lower court is regulated by Section 107 read with Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). Rule 23 of Order XLI of CPC enables the Appellate Court to remand the case back to the trial court if the judgment has been passed on a preliminary issue and the aforesaid finding on the preliminary issue has been set aside by the Appellate Court. Rule 23A enables the Appellate Court to remand the case back to the trial court if the decree is reversed in appeal and a re-trial is considered necessary. Thus, the power of remand of the Appellate Court is available only

in the eventualities provided under Rule 23 and 23A of Order XLI. It is incumbent for the Appellate Court to set aside the judgment and decree passed by the trial court on merits and conclude by giving adequate reason for necessity of retrial of the suit. On a careful reading of the operative part of the impugned judgment, it is evident that the court has neither set aside the judgment of the trial court on merits nor it has recorded the reasons for which the re-trial is considered necessary. Learned counsel representing the respondent though requested to explain the reasons for necessity of re-trial, however, he failed to draw the attention of the Court in this regard. ”

4. Learned counsel representing the respondents does not dispute that the First Appellate Court has neither discussed nor analyzed the reasons given by the trial Court. There is absence of critical appraisal of the reasons given by the trial Court while decreeing the suit.

5. Keeping in view the aforesaid discussion, this Court is left with no choice but to set aside the judgment passed by the trial Court on 02.04.2022. The first appeal filed by the State of Haryana shall stand restored to its original number. It shall be open to the First Appellate Court to frame proper issues and permit the parties to lead evidence, if prayed for. It shall also be open to the First Appellate Court to seek a report from the trial Court on the additional issue if any culled out by the Court.

6. Disposed of, accordingly.

7. The parties through their counsel are directed to appear before the First Appellate Court on 09.11.2023.

October 12, 2023
‘Raman’

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : *Yes/No*
Whether reportable : *Yes/No*